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And Dennis Simpson

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
MEDFORD DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ADEPT MANAGEMENT, INC., et, al.

Defendants.

CIVIL ACTION NO. 1:16-CV-00720-CL

Magistrate Judge Clarke

**THE SIMPSON DEFENDANTS'
REPLY TO THE FTC'S RESPONSE
TO THE HOYAL DEFENDANTS'
MOTION TO BIFURCATE**

Dennis Simpson and Reality Kats, LLC, (herein referred to as the “Simpson Defendants”), by and through the undersigned counsel, submits this Reply to the FTC’s Response to Jeffrey Hoyal, Lori Hoyal, and Hoyal & Associates, Inc.’s (herein referred to as the “Hoyal Defendants”) Motion to Bifurcate.

WHEREFORE, The Simpson Defendants respectfully request that this Court GRANT the Hoyal Defendants' Motion to Bifurcate, and grant such other and further relief as this Court deems appropriate.

DATED: February 7, 2018

Respectfully Submitted,

/s/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 7, 2018, a copy of the foregoing was served electronically in compliance with this Court's electronic filing system to the pertinent parties of record in this matter:

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Respectfully Submitted,

/s/

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**Memorandum of Points and Authorities in Support of the Simpson Defendant's
Reply to the FTC's Response to the Hoyal Defendants' Motion to Bifurcate**

Legal Standards

On a case-by-case basis, courts should examine, among other factors, whether bifurcation is needed to avoid or minimize prejudice, [and] whether it will produce economies in the trial of the matter[.]. *Lewis v. City of New York*, 689 F. Supp. 2d 417, 429, 2010 U.S. Dist. LEXIS 18738, *27. Bifurcation may be advisable if the case contains a large number of dissimilar or complex issues, if the trial of one issue is likely to be much shorter than the others or if the determination of the issues in the first trial may eliminate the need for a second trial. *P&G v. Nabisco Brands, Inc.*, 604 F. Supp. 1485, 1491-1492, 1985 U.S. Dist. LEXIS 21555, *19-20, 225 U.S.P.Q. (BNA) 929, 933, 2 Fed. R. Serv. 3d (Callaghan) 748.

Argument

I. Bifurcation is Necessary to Promote Judicial Economy and to Avoid Wasting Time and Resources On Unnecessary Issues.

The FTC concludes that “how Defendants’ operated together in concert” demonstrates “how and why the representations made by the mailers are deceptive[.]” *FTC Response*, p. 6-7 (ECF #228). However, the FTC fails to explain how this is possible. And it is not surprising that an explanation is lacking, because the marketing effort of a company, like Apple Computer for example, cannot be judged on the basis of its business structure, and its myriad company ownerships, and off shore tax havens.

Indeed, the FTC opposition to bifurcation appears to belie the FTC's intent to confuse the issue of whether the mail piece is deceptive, with other issues. But let there be no confusion, if this Court determines that the mail piece is not deceptive, then it would obviate the need to examine all the "operations-related" evidence that the FTC claims it wants to bring, i.e. that, "multiple Defendants were involved in its design and development; had input into revision to the design and text; directed dissemination of the mailer to specific consumers and for specific publication; and reviewed and approved the mailer "proofs" before they were printed and distributed to consumers." *Id.*, p. 6. Moreover, this "operations-related" evidence appears to be directed to the issue of whether certain defendants can be found individually and personally liable under the FTC Act, based on intentional and/or knowing deception. But again, if the Court determines that the mail piece is not deceptive, then all of the time and effort spent on "operations-related" evidence will have been wasted. Indeed, there is nothing at all in the exhibit that the FTC attached to its opposition, which bases a deceptiveness determination on operations-related evidence. *Id.*, at Exhibit A.

The time and effort associated with the issue of individual personal liability cannot be understated, as it involves examining the decades of history that provide the context for the defendants' states of mind. For example, Mr. Simpson testified in his deposition about a 2001 lawsuit *by him against the FTC*, which dealt with whether mail pieces were deceptive. See *Exhibit A*. That case was resolved on the basis that an Oregon state proceeding would decide the lawfulness of the mail piece, and that proceeding, the Oregon state proceeding, concluded by settlement in 2004. *See Exhibit B*.

The issue of individual liability will also involve examining the issue of advice of counsel, and will involve facts associated with other third parties, such as the United States

Postal Service and “mail houses” that approved the mail pieces and believed that they were within the standards and guidelines for conducting normal direct mail operations. Case law associated with patent-infringement lawsuits supports bifurcation, as those cases involve a distinction between validity of the patent as an initial inquiry, and knowing infringement as an element of damages analysis. *See Lear Corp. v. Bertrand Faure Tech. Ctr., Inc.*, 2001 U.S. Dist. LEXIS 25479 (discussing attorney-client privilege dilemma, and circuit split, and finding bifurcation appropriate). Just as in the example of patent infringement, the issue of individual personal liability under the FTC Act can be much more complex and require much more time and effort to litigate, than the threshold question of whether there was a deceptive practice.

In addition, the issue of individual liability is related to application of the common enterprise doctrine, and the time and effort associated with the issue of common enterprise liability also cannot be understated, as it involves examining the decades long history that provides the context for understanding the relationship between the defendants and who was controlling and directing the business. Moreover, in this matter, the relationship between the Hoyal Defendants and the Simpson Defendants and David Lennon, their attorney, is highly contested, and is proving to be a case within itself, as it is in fact the subject of multiple currently pending lawsuits in other forums.

Conclusion

This is clearly a case for which bifurcation is appropriate because of the nine (9) categories of evidence that the FTC claims it plans on producing, only one category deals with operations-related evidence. However, this one category represents a disproportionately larger amount of the overall litigation of this matter. And litigation of this disproportionately complex

and burdensome issue may be eliminated altogether by bifurcating it to a later phase of the litigation, to be completed only if necessary.

DATED: February 7, 2018

Respectfully Submitted,

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